

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JOHN M. FOSTER,

Plaintiff,

v.

KEN FURLONG, *et al.*,

Defendants.

3:13-cv-00060-RCJ-VPC

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

February 28, 2014

This Report and Recommendation is made to the Honorable Robert C. Jones, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. The court previously granted plaintiff's application to proceed *in forma pauperis* and dismissed his *pro se* complaint with leave to amend (#5).¹ Now before the court is plaintiff's first amended complaint (#7-1). Having thoroughly reviewed the record, the court recommends that plaintiff's amended complaint be dismissed with prejudice and without leave to amend.

I. Screening Pursuant to 28 U.S.C. § 1915

As the court explained previously, applications to proceed *in forma pauperis* are governed by 28 U.S.C. § 1915, which "authorizes the court to dismiss an [*in forma pauperis*] action that is frivolous or malicious." *Franklin v. Murphy*, 745 F.2d 1221, 1226 (9th Cir. 1984) (citing 28 U.S.C. § 1915(a) (citing 28 U.S.C. § 1915(d))). While in this case plaintiff is in the custody of the Nevada Department of Corrections, this provision applies to all actions filed *in forma pauperis*, whether or

¹ Refers to the court's docket number.

1 not the plaintiff is incarcerated. *See Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (en banc);
2 *see also Calhoun v. Stahl*, 254 F.3d 845 (9th Cir. 2001) (per curiam).

3 28 U.S.C. § 1915 provides: “the court shall dismiss the case at any time if the court
4 determines that . . . the action or appeal (i) is frivolous or malicious; (ii) fails to state a claim upon
5 which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from
6 such relief.” 28 U.S.C. § 1915(e)(2)(B)(i)-(iii). Dismissal of a complaint for failure to state a claim
7 upon which relief may be granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and
8 this court applies the same standard under Section 1915(e)(2) when reviewing the adequacy of a
9 complaint or amended complaint. *See Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000) (citation
10 omitted). Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v.*
11 *Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).

12 In reviewing a complaint under this standard, the court must accept as true the allegations of
13 the complaint in question, *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 740 (1976),
14 construe the pleading in the light most favorable to plaintiff, and resolve all doubts in the plaintiff’s
15 favor, *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Allegations in *pro se* complaints are held to
16 less stringent standards than formal pleadings drafted by lawyers, and must be liberally construed.
17 *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per
18 curiam); *see also Hamilton v. Brown*, 630 F.3d 889, 893 (9th Cir. 2011); *Hebbe v. Pliler*, 627 F.3d
19 338, 342 (9th Cir. 2010); *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

20 A complaint must contain more than a “formulaic recitation of the elements of a cause of
21 action;” it must contain factual allegations sufficient to “raise a right to relief above the speculative
22 level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain
23 something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally
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cognizable right of action.” *Id.* (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). At a minimum, a plaintiff should state “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

42 U.S.C. § 1983 creates a cause of action allowing a plaintiff to enforce federal rights created by the Constitution or federal statute. *See Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). “To sustain an action under Section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right.” *Wood v. Ostrader*, 879 F.2d 583, 587 (9th Cir. 1989). Section 1983 does not provide a cause of action for violations of state law. *See Galen v. County of Los Angeles*, 477 F.3d 652, 662 (9th Cir. 2007).

II. Discussion

Plaintiff has filed a first amended complaint pursuant to 42 U.S.C. § 1983 (#7-1). He alleges that Carson City defendants Sheriff Kenneth Furlong, Sheriff’s Deputy Tara Collier, Risk Management Coordinator Cecilia Meyer, and defendant private attorney Steven J. Klearman violated his Fourteenth Amendment due process rights. *Id.* He also alleges that Collier violated his Fourth Amendment rights. From what the court can discern, plaintiff asserts the following: on December 30, 2010, he was operating a vehicle and was “alleged to be intoxicated.” Collier drove her patrol vehicle westbound on an eastbound lane in order to stop plaintiff’s vehicle. Her “roadblock” caused a collision between her patrol car and plaintiff’s vehicle. *Id.* at 2-5.

Plaintiff was ultimately found guilty (presumably of driving under the influence), sentenced to prison, and assessed restitution of more than \$27,000. Pursuant to the conviction, the state court

1 entered an order directing all parties to file their monetary claims against plaintiff. *Id.* Following
2 plaintiff's incarceration, defendant Klearman filed a lawsuit against plaintiff and his auto insurance
3 carrier on behalf of defendant Collier. These defendants knew that Collier had "illegally" created a
4 roadblock at the scene of the accident. They accepted a \$35,000 settlement from the insurance
5 carrier, which constituted a fraud on the carrier in violation of NRS 41.139. Defendants Furlong and
6 Meyers "acted contrary to a court's order for the sole purpose of depriving the plaintiff of a due
7 process hearing by filing a second and false claim against the plaintiff and his insurance company,"
8 when they filed a claim with plaintiff's carrier for over \$72,000, which caused the carrier to sue
9 plaintiff. *Id.* at 3-5.
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12 The Due Process Clause of the Fourteenth Amendment protects individuals from arbitrary
13 government action by prohibiting states from depriving people of "life, liberty, or property without
14 due process of law." U.S. Const. amend. XIV. To prevail on a claim of deprivation of liberty
15 without due process of law, a plaintiff must first establish the existence of a liberty interest. *Serrano*
16 *v. Francis*, 345 F.3d 1071, 1078 (9th Cir. 2003).
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18 With respect to due process, the only discernible, relevant factual allegations in the amended
19 complaint actually sound in fraud, a state tort-law claim. Plaintiff alleges that defendants Klearman
20 and Collier perpetrated insurance fraud. Section 1983 does not provide a cause of action for
21 violations of state law. *See Galen*, 477 F.3d at 662. Plaintiff again fails to set forth specific
22 allegations about any "due process hearing" of which defendants Furlong and Meyers deprived him.
23 Accordingly, the court concludes that plaintiff's Fourteenth Amendment claims must be dismissed.
24 He has already been given the opportunity to amend these claims, and therefore, they should be
25 dismissed with prejudice and without leave to amend. *See Cato v. United States*, 70 F.3d 1103, 1106
26 (9th Cir. 1995) (citation omitted).
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1 Next, plaintiff alleges that Collier's action of blocking the lane, which caused the collision,
2 constituted an "illegal" seizure in violation of his Fourth Amendment rights. The Fourth
3 Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. In *Brower*
4 *v. County of Inyo*, the United States Supreme Court held that a roadblock generally constitutes a
5 "seizure" that implicates Fourth Amendment protections. 489 U.S. 593, 598 (1989). A defendant
6 may be liable under § 1983 if the seizure was unreasonable. *Id.* at 599. Plaintiff alleges that Collier
7 acted in contravention to Carson City Sheriff's office policy and endangered his life. While, at this
8 very early stage of litigation, plaintiff's allegations state a Fourth Amendment claim against Collier,
9 the court concludes that this claim must, nevertheless, be dismissed. Plaintiff alleges that the
10 roadblock occurred on December 30, 2010. Because § 1983 contains no specific statute of
11 limitations, federal courts should borrow state statutes of limitations for personal injury actions in §
12 1983 suits. *See, e.g., Wallace v. Kato*, 549 U.S. 384 (2007). In Nevada, a personal injury action
13 must be brought within two years. Nev. Rev. Stat. § 11.190(4)(e). Plaintiff filed this action on
14 February 7, 2013, more than two years after the alleged Fourth Amendment violation. Accordingly,
15 plaintiff's claim is barred by the statute of limitations.

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19 The court therefore concludes that, because plaintiff fails to state any Fourteenth Amendment
20 claims for which relief may be granted and because his Fourth Amendment claim is barred by the
21 statute of limitations, his amended complaint should be dismissed with prejudice and without leave
22 to amend.

23 24 **III. Conclusion**

25 **IT IS THEREFORE RECOMMENDED** that the Clerk shall detach and **FILE** the
26 amended complaint (#7-1).

27 **IT IS FURTHER RECOMMENDED** that plaintiff's motion to file an enlarged complaint
28 (#7) be **GRANTED** nunc pro tunc.

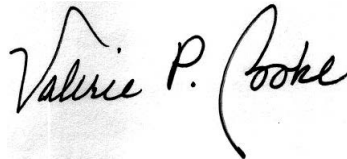
1 **IT IS FURTHER RECOMMENDED** that plaintiff's amended complaint be **DISMISSED**
2 **with prejudice and without leave to amend.**

3 **IT IS FURTHER RECOMMENDED** that the Clerk shall **ENTER JUDGMENT**
4 accordingly and close this case.

5 The parties should be aware of the following:

- 6 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the
7 parties may file specific written objections to this Report and Recommendation within
8 fourteen days of receipt. These objections should be titled "Objections to Magistrate Judge's
9 Report and Recommendation" and should be accompanied by points and authorities for
10 consideration by the District Court.
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12 2. This Report and Recommendation is not an appealable order and any notice of appeal
13 pursuant to Fed.R.App.P. 4(a)(1) should not be filed until entry of the District Court's
14 judgment.
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18 **DATED:** February 28, 2014.



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20 **UNITED STATES MAGISTRATE JUDGE**
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